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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. William M. Timberlake, Defendant and Appellant.	A155512 (Sonoma County Super. Ct. No. SCR5776194)

Defendant William Timberlake agreed to plead no contest to two criminal counts (assault with a semiautomatic firearm and participation in a criminal street gang), plus enhancements for use of a firearm, gang involvement, and a prior prison conviction. In exchange, he received a stipulated determinate sentence of 25 years, and several other counts and enhancements were dismissed. The trial court accepted the plea and sentenced Timberlake to 25 years as agreed, but several years later, recalled the sentence and resentenced him to 20 years eight months.

Timberlake appeals. His request for a certificate of probable cause was denied by the superior court. On appeal, he argues the trial court's imposition of an eight-month consecutive term on the gang offense violates the prohibition of double punishment under Penal Code section 654.[1] The People move to dismiss the appeal due to Timberlake's

[1] All further statutory references are to the Penal Code. Section 654 provides in relevant part that an act or omission that is punishable in different ways by different provisions of law cannot be punished under more than one provision. (§ 654, subd. (a).)

failure to obtain a certificate of probable cause. We agree with the People that a certificate of probable cause was required. Accordingly, we shall dismiss the appeal.

PROCEDURAL BACKGROUND

In 2010, Timberlake was charged by information with five counts based upon his shooting of a firearm into an inhabited residence: (1) attempted murder (§§ 664, 187, subd. (a)) with enhancements for commission of a felony by personal use and discharge of a firearm (§ 12022.53, subds. (b), (c), (e)) and for the benefit of, at the direction or, or in association with a criminal street gang with the specific intent to promote, further or assist criminal conduct by gang members (§ 186.22, subd. (b)(1)(C));[2] (2) shooting at an inhabited dwelling (§ 246) with gang enhancements (§ 186.22, subd. (b)(1)(C) & (b)(4)); (3) assault with a deadly weapon (§ 245, subd. (a)(2)) with firearm and gang enhancements (§§ 12022.5, subd. (a), 186.22, subd. (b)(1)(B)); (4) being a felon in possession of a firearm (§ 12021, subd. (a)(1)); and (5) participation in a criminal street gang (§ 186.22, subd. (a)). The information also alleged an enhancement for one prior prison term (§ 667.5, subd. (b)).

In October 2011, pursuant to a negotiated plea, the People amended the information to add a sixth count of assault with a semiautomatic firearm (§ 245, subd. (b)), with firearm and gang enhancements (§§ 12022.5, 186.22, subd. (b)(1)(B)). In exchange for a stipulated determinate sentence of 25 years and dismissal of counts two through four plus enhancements, Timberlake pleaded no contest to count five, and the newly-added count six, along with the attendant firearm, gang and prior prison term enhancements.

In November 2011, the trial court sentenced Timberlake to an aggregate prison term of 25 years. The sentence was structured as follows: the maximum term of nine years on count six; a consecutive 10-year term for the firearm use enhancement on count six (§ 12022.5); a consecutive five-year term for the gang enhancement on count six (§ 186.22, subd. (b)(1)(B)); a *concurrent* two-year term for gang participation, as charged

[2] The trial court later granted Timberlake's section 995 motion and dismissed count one.

in count five (§ 186.22, subd. (a)); and a one-year consecutive term for the prior prison term (§ 667.5, subd. (b)). The court also imposed a restitution fine of $10,000.

While Timberlake was serving his sentence, the California Supreme Court held in *People v. Le* (2015) 61 Cal.4th 416 (*Le*) that a trial court was precluded under section 1170.1 from imposing both a firearm enhancement under section 12022.5, subdivision (a)(1), and a gang enhancement under section 186.22, subdivision (b)(1)(B), when the crime qualifies as a serious felony solely because it involved firearm use. Consequently, in May 2018, the California Department of Corrections and Rehabilitation notified the trial court that it was recommending recall of Timberlake's commitment in light of *Le*.

The trial court recalled Timberlake's commitment, and in August 2018, resentenced him to an aggregate term of 20 years eight months, and reduced his restitution fine to $5,000. The trial court stayed the five-year term previously imposed for the gang enhancement on count six, and made the sentence for the gang participation offense charged in count five a *consecutive* rather than *concurrent* term of eight months (which is one-third of the middle term prescribed under section 186.22, subdivision (a), for the crime of participating in a criminal street gang).

On October 1, 2018, Timberlake filed a notice of appeal along with a request for certificate of probable cause, alleging "[s]entencing errors [and] failure to follow the spirit and language of the Youthful Offender Act." On October 4, 2018, the trial court denied the request for a probable cause certificate.

Timberlake relies on *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*) to argue that the imposition of the eight-month consecutive term on count five violates the multiple punishment prohibition of section 654 because committing an assault with a firearm supplied the third element of the gang participation offense alleged in count five, and it was already the basis for the sentence imposed for assault under count six. Timberlake contends that *Mesa*, like *Le*, constitutes a change in the law that occurred subsequent to his plea agreement, and the plea agreement should be deemed to incorporate the subsequent decisions.

DISCUSSION

The People argue the appeal should be dismissed because Timberlake failed to obtain a certificate of probable cause. A certificate was required, the People contend, because Timberlake is seeking to reduce a stipulated determinate sentence that he clearly and unequivocally agreed to, and the appeal is therefore an attack on the validity of the plea.

Timberlake argues a certificate was not required because the appeal is taken from post-plea proceedings and does not constitute an attack on the validity of the plea because the trial court did not impose the original sentence specified by the plea agreement. Rather, it modified and restructured the plea deal to comply with *Le*, and in doing so, explicitly exercised its discretion to impose a consecutive eight-month term for the gang offense charged in count five.

Section 1237.5 provides that "[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." "The purpose for requiring a certificate of probable cause is to discourage and weed out frivolous or vexatious appeals challenging convictions following guilty and nolo contendere pleas." (*People v. Panizzon* (1996) 13 Cal.4th 68, 75 (*Panizzon*).)

California courts recognize two exceptions to the certificate requirement: "(1) search and seizure issues for which an appeal is provided under section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed." (*Panizzon*, *supra*, 13 Cal.4th at p. 74.) Rule 8.304 of the California Rules of Court implements these exceptions, providing that a defendant need not comply with the certificate requirement "if the notice of appeal states that the appeal is based on: [¶]

(A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or [¶] (B) Grounds that arose after entry of the plea and do not affect the plea's validity." (Cal Rules of Court, rule 8.304(b)(4).) The certificate requirements of section 1237.5 and rule 8.304 "should be applied in a strict manner." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1098 (*Mendez*).)

Where an agreed-upon sentence is an "integral part of the plea agreement," a defendant may not challenge the sentence without first obtaining a certificate of probable cause. (*Panizzon, supra*, 13 Cal.4th at pp. 76-77, 78; *People v. Hester* (2000) 22 Cal.4th 290, 295 (*Hester*) [plea deal for specified sentence constituted implicit waiver of defendant's right to contend sentence violated section 654].) Here, the stipulated aggregate sentence of 25 years was an integral part of the plea agreement. Timberlake was otherwise facing several other counts and enhancements including a gang enhancement for shooting into an inhabited dwelling that exposed him to a possible indeterminate life term. (§§ 186.22, subd. (b)(4), 246.) By pleading no contest to counts five and six and related enhancements and the 25-year sentence, Timberlake obtained the dismissal of the other counts and avoided the possibility of an indeterminate life term. Thus, the stipulated sentence which he seeks to reduce in this appeal was an integral part of his plea.

While this appeal involves a post-plea proceeding that took place many years after the plea was entered, the post-plea nature of the proceeding is not dispositive. (Cal. Rules of Court, rule 8.304(b)(4)(B) [exception to certificate requirement for appeal based on grounds that "arose after entry of the plea *and* do not affect the plea's validity" (italics added)].) " '[T]he crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.' [Citation.] Hence, the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5." (*Panizzon, supra,* 13 Cal.4th at p. 76.) This appeal is, in substance, a challenge to the validity of the plea because it arises out of a proceeding to craft a stipulated sentence that conforms to the plea agreement.

Timberlake argues he is not attacking the validity of the plea, but rather, the trial court's recent decision to make the sentence on count five consecutive rather than concurrent. He says he never agreed to a consecutive sentence. But the plea agreement did not change as a result of *Le* or Timberlake's resentencing. As far as the record shows, the plea deal did not specify a sentencing structure. From the record, it appears the parties left it to the trial court to configure a sentence with a 25-year aggregate term, and it was entirely foreseeable both at the time of original sentencing and upon resentencing that the trial court might designate the sentence on count five to run consecutively. The trial court had the authority to "resentence the defendant in the same manner as if he . . . had not previously been sentenced, provided the new sentence, if any, [was] no greater than the initial sentence." (§ 1170, subd. (d).) The resentenced term did not exceed the initial agreed-upon sentence. Thus, we conclude this appeal is an attack upon the plea deal Timberlake already accepted.

Timberlake further argues he is challenging the trial court's post-plea exercise of *discretion*, not the plea agreement itself. On first glance, this argument appears to have some merit. A trial court's decision under section 669 as to whether criminal sentences will be served consecutively or concurrently is indeed discretionary. (§ 669; *People v. Morales* (1967) 252 Cal.App.2d 537, 547.) A probable cause certificate is not required to challenge the trial court's exercise of discretion that the parties reserved to the trial court under the bargain. (*People v. Buttram* (2003) 30 Cal.4th 773, 786 (*Buttram*).) "[W]hen the claim on appeal is merely that the trial court abused the discretion the parties intended it to exercise, there is, in substance, no attack on a sentence that was 'part of [the] plea bargain.' [Citation.] Instead, the appellate challenge is one contemplated, and reserved, by the agreement itself." (*Id.* at pp. 785-786.)

Notably however, *Buttram* involved a plea deal for a "lid" sentence, not a stipulated sentence. As discussed, where the plea involves a stipulated sentence, the rule is that a defendant seeking to reduce that sentence is necessarily challenging the validity of the plea. (*Panizzon*, *supra*, 13 Cal.4th at pp. 73, 79.) Furthermore, regardless of whether this is a lid or stipulated sentence, Timberlake's precise argument here is that the

eight-month consecutive term on count five violates section 654. In *People v. Shelton* (2006) 37 Cal.4th 759 (*Shelton*), the Supreme Court held that a section 654 challenge to the imposition of the lid sentence under a plea deal was an attack not on the trial court's sentencing *discretion* but on its *authority* to impose the sentence, which was an attack on the plea's validity. (*Id*. at p. 770.)

The plea agreement in *Shelton* imposed a lid sentence of three years and eight months in prison but permitted the defendant to " 'argue for' " a lesser term, which the Supreme Court found to be ambiguous because it could mean either the defendant was permitted to argue on *any ground* (i.e., section 654) for a lesser term, or that he was only permitted to urge the trial court to exercise its sentencing discretion in favor of a lesser term. (*Shelton, supra,* 37 Cal.4th at p. 767.) Because a negotiated plea agreement is a form of contract, the court applied the rules of contractual interpretation and concluded that "[t]he specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose and also a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term." (*Id*. at p. 768.) Thus, the term allowing the defendant to argue for a lesser sentence did not allow the defendant to attack the trial court's *authority* to impose the maximum sentence. (*Id*. at pp. 768-769.) "Because the plea agreement was based on a mutual understanding (as determined according to principles of contract interpretation) that the court had authority to impose the lid sentence, defendant's contention that the lid sentence violated the multiple punishment prohibition of Penal Code section 654 was in substance a challenge to the plea's validity and thus required a certificate of probable cause, which defendant failed to secure." (*Id*. at p. 769.)

Although *Shelton* involved a lid sentence, its reasoning controls here. Timberlake, in entering a plea in exchange for a stipulated sentence, implicitly agreed that the trial court had the authority to lawfully impose it. Thus, his challenge to the recently imposed sentence based on section 654 does not challenge the trial court's sentencing discretion,

but the trial court's *authority* to impose the agreed upon sentence, which is an attack on the plea's validity.

Timberlake additionally argues a certificate is not required because *Mesa*, like *Le*, constituted a change in the law, and plea bargains are deemed to incorporate and contemplate subsequent changes in the law. (*Doe v. Harris* (2013) 57 Cal.4th 64, 66 (*Doe*).) Thus, Timberlake argues he can appeal the portion of the agreement affected by the change in law without a probable cause certificate. Timberlake relies on a line of cases including *People v. Hurlic* (2018) 25 Cal.App.5th 50, *People v. Baldivia* (2018) 28 Cal.App.5th 1071, and *People v. Stamps* (2019) 34 Cal.App.5th 117, review granted June 12, 2019, S255843, which held that because of the general rule set forth in *Doe*, a probable cause certificate is not required when the defendant challenges an agreed-upon sentence based on a newly enacted statute that retroactively grants a trial court discretion to waive an enhancement that was mandatory at the time of the plea agreement. Two very recent decisions of Division One of this court, *People v. Fox* (2019) 34 Cal.App.5th 1124 and *People v. Galindo* (2019) 35 Cal.App.5th 658, have criticized the reasoning and conclusions of *Hurlic*.

More importantly, even if we assumed the *Hurlic* line of cases is controlling, Timberlake must first establish that the change in law is retroactive. *Hurlic* and the cases discussing it involved *statutory* law as opposed to *decisional* law. To determine whether a judicial decision should be given retroactive effect, we must ask the threshold question of whether the decision establishes a new rule of law by explicitly overruling a precedent of the Supreme Court, disapproving a practice impliedly sanctioned by prior decisions of the Supreme Court, or disapproving a longstanding and widespread practice expressly approved by a near-unanimous body of lower-court authorities. (*People v. Guerra* (1984) 37 Cal.3d 385, 401.) Decisions that merely explain or refine the holding of a prior case or apply an existing precedent to a different fact situation do not establish new rules for retroactivity purposes. (*Id.* at p. 399.) Here, Timberlake does not argue that *Mesa* established a new rule of law under these standards. Rather, he recognizes that *Mesa* approved and applied the prior decision in *People v. Sanchez* (2009) 179 Cal.App.4th

1297, disapproved on other grounds in *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1136-1137 & fn 8. Because he does not establish *Mesa*'s retroactivity, Timberlake fails to demonstrate that he should be permitted to appeal in the absence of a probable cause certificate consistent with the *Hurlic* line of cases.

Timberlake's challenge to resentencing on section 654 grounds is an attack on the validity of his previously accepted plea agreement as affected by *Le*. Timberlake received the benefit of the bargain of his plea because he avoided a potential life term (and, in fact, received a shorter sentence than he bargained for). "[D]efendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*Hester*, *supra*, 22 Cal.4th at p. 295; *People v. Kelly* (2019) 32 Cal.App.5th 1013, 1018, review granted June 12, 2019, S255145.) Applying the certificate requirements strictly (*Mendez*, *supra*, 19 Cal.4th at p. 1098), we conclude a certificate of probable cause was required.

DISPOSITION

The motion to dismiss the appeal is granted.

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Siggins, P.J.

WE CONCUR:

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Fujisaki, J.

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Petrou, J.